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In the

Supreme Court of the United States

October Term, 1996

RICHARD K. EHRLICH, as trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,
Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARDIES, AND PAUL A. JACOBS
Respondents.

Petition for Writ of Certiorari
to the California Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, RICHARD EHRLICH, AS TRUSTEE OF THE 1985 EHRLICH FAMILY TRUST AND AS TRUSTEE OF THE JULY 28, 1965, TRUST

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the nation and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

PLF joined with Richard K. Ehrlich (the petitioner in this case) in an amicus brief in support of Florence Dolan's petition for certiorari in *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309 (1994), which this Court granted on November 29, 1993. PLF also supported Richard Ehrlich's first petition for certiorari, Case Number 93-842, before this Court which was granted on June 27, 1994, as reported at 512 U.S. ___, 114 S. Ct. 2731. PLF also participated as amicus, both in the filing of briefs and the sharing of oral argument time, before the California Court of Appeal and the California Supreme Court in this case.

Pacific Legal Foundation can provide a unique perspective to this Court's determination of whether it should again grant certiorari in this case. The Foundation's supporters who own property are all too familiar with the way that government uses the regulatory process to finance public goods. The Foundation has

over 23 years of experience in dealing with governmental entities who do not see private ownership of property as a means of enhancing the public weal through the harnessing of private enterprise. Instead these entities see private property either as an impediment to amassing greater governmental authority or as an opportunity to increase the public coffers or land base as a quid pro quo for agreeing to change a use restriction (such as changing a use designation, zoning, or granting a permit) that might enable a landowner to make reasonable use of land.

Consent to the filing of this brief has been granted by all parties to this case and letters of consent have been lodged with the Clerk of the Court.

OPINION BELOW

The opinion of the California Supreme Court is reported at *Ehrlich v. City of Culver City*, 12 Cal. 4th 854. The opinions and orders below in this case are reproduced in petitioner's appendix.

STATEMENT OF THE CASE

This case involves a most extreme application of the notion that when there is any change in the regulatory status of a parcel of property, the government may use the occasion of that change as a vehicle for demanding a "tribute" from the owner of the property. In this case Richard Ehrlich wished to have a land use restriction that permitted only a very particular type of commercial recreation on his vacant property, a recreation use on which he had been losing money for years until the facilities were lawfully demolished, replaced with another land use restriction that would accommodate condominiums. The City agreed to the change, but imposed a price. Two costs in particular are the subject of this litigation: Ehrlich had to pay $280,000 so the City could build four public tennis courts and Ehrlich had to either pay $33,200 (calculated at 1% of the value of the project) to the City for public art to be placed at a location of the City's choosing or Ehrlich had to agree to build and maintain public art on his property that would

be worth at least $33,200. Appellant's Appendix at A6-7, E4, G5-6, L5, N1-12. The California Supreme Court, allegedly applying a heightened scrutiny analysis, determined that the City could exact some sort of public recreation fee, although it declined to decide exactly how much that fee should be--allowing the City to make a new calculation of the fee.[1] The court further declined to apply heightened scrutiny to the arts fee because it was "legislatively" enacted. The fee was upheld under a relaxed standard of review since it was merely akin to an "aesthetic" regulation. 12 Cal. 4th at 881, 885-86.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

It is true, no doubt, that the public has many desires. It may also be true that a responsive government attempts to fulfill some of those desires. In this case, the public desires public art and public tennis courts. In the presence of these desires Richard Ehrlich sought a change in the restrictions placed upon the use of his property. The City of Culver City found this to be a splendid opportunity to demand that Richard Ehrlich fulfill the public's desires in exchange for modifying a regulatory restriction so that Ehrlich could put his property to reasonable use.

This Court has already indicated in *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Dolan v. City of Tigard*, 114 S. Ct. 2309, that the permitting process is not an occasion for a governmental entity to demand whatever it wishes from a person attempting to make reasonable use of property. In this case the

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[1] The Supreme Court remanded the case to the Court of Appeal, directing the case to be returned to the City of Culver City, thus terminating the litigation in California. 12 Cal. 4th at 887. As such, the decision of the Court below establishing liability for a fee is final and appropriately before this Court. In any event, the issue in Ehrlich's petition is not the amount of the fee, but the court's conclusive determination that any such fee could be imposed in the first place.

City as well as the courts below do not understand this Court's message. They believe that *Nollan* and *Dolan* do not necessarily apply when a property owner is told to write a check rather than write a deed. They believe that if a legislative body takes an outrageous exaction that is permissible because it is done in the open. They believe that if *Nollan* and *Dolan* do apply, the constitutional "nexus" and "rough proportionality" standards are easily satisfied when one land use restriction is replaced by another. That is because a land use restriction has the same effect as a servitude, meaning that a property owner can be forced to pay a fee to have the restriction (or servitude) altered. Thus it follows that the government can demand that a landowner provide to the public whatever public benefits that might have flowed from the original land use restriction. And they believe that legislatively imposed uniform exactions are virtually immune to challenge under the United States Constitution.

But as will be shown below, an attempt to alter the restrictions placed upon the reasonable use of property does not convert either the owner or the property into a money-tree for the government.

The lower courts are in hopeless conflict over the question of how the imposition of monetary permit exactions relate to the Takings Clause. Only this Court can resolve the confusion and misunderstandings of the lower courts.

I
THE CALIFORNIA SUPREME COURT FAILED TO UNDERSTAND THE LOGIC BEHIND NOLLAN AND DOLAN AND THUS FAILED TO PROPERLY APPLY THOSE CASES

If for no other reason, this Court should grant certiorari in order to dispel the persistent myth that land use permit conditions that exact land are subject to the Takings Clause of the United States Constitution while exactions of monetary fees are generally not subject to careful constitutional review, meaning that this Court's analyses in *Nollan* and *Dolan* can safely be ignored.

The California Supreme Court did not adopt the myth totally, in that it found that ***some*** of the fees in this case ***were***

indeed subject to the careful review called for in *Nollan* and *Dolan*. However, it was not able to grasp the relevancy of *Nollan* and *Dolan* to the art in public places fee, and it misunderstood ***why*** the exaction of adjudicatively imposed are subject to constitutional constraints. This misunderstanding ultimately led to the California court's affirmance of the imposition of some public recreational mitigation fee in this case, although it could not determine *how much* the fee would be.

First, with respect to the public recreation fee, the California Supreme Court did recognize that when fees are imposed in the context of an individual permitting process they may be subject to what it referred to as heightened judicial scrutiny under the takings analysis of *Nollan* and *Dolan*. However, the court erroneously focused on the way in which the fee was set, rather than on the constraints caused by the fee on the ability to utilize real property. Specifically, the court found that the public recreation fee was subject to close scrutiny because it was set during the "discretionary" context of an individualized permitting process. 12 Cal. 4th at 876. This is in contrast to legislatively imposed permit fees (and presumably other conditions) that are set in a different context. Because of the supposed greater potential for mischief in the former (a debatable proposition at best) *those* fees require closer review by the courts. *Id.*

The court's reasoning fails to follow the dictates of this Court on the application of the Takings Clause to permit exactions. The key is not the means by which the amount of the exaction or fee is set, but the effect of the exaction on the constitutionally protected right to make reasonable use of private property. In *Nollan* this Court recognized that the ability to utilize and develop real property, subject of course to reasonable permitting requirements, is a ***right*** and not a mere ***benefit*** conferred by the government. *Nollan*, 483 U.S. at 833 n.2. Thus, when government imposes something substantively more tangible and confiscatory upon a landowner than a mere permitting requirement, or a mere administrative fee, as a precondition for the ability to exercise the right to make reasonable use of property, reviewing courts must carefully analyze the nature of the imposition using the

standards of *Nollan* and *Dolan* to ensure that government does not overreach and take private property without just compensation.

To be sure, a requirement that a person dedicate real property to a public use is particularly intrusive of the rights of the affected property owner. Standing alone such a condition plainly would be a taking. In *Dolan*, for example, it would be quite logical to conclude that if Mrs. Dolan had been required to give up a bicycle path or greenway--***outside the context of a permitting process--that*** would have been a taking. *Dolan*, 114 S.Ct. at 2316. In fact, of course, Mrs Dolan did not agree to the condition and appealed. The reason why the city's action violated the Takings Clause was not because the city took Mrs. Dolan's land for a bike path or green belt (it had not yet done so) but because it was imposing a condition that it had not shown to be closely enough related to any impacts caused by Mrs. Dolan's project. It failed to substantially advance a legitimate governmental interest. The taking occurred because an unjustified restriction was placed upon Mrs. Dolan's ***right*** to make reasonable use of her property. The fact that the restriction would ***also***, by itself and standing alone, be a taking highlights the government's overreaching in the case--***but does not provide the essential rationale for the holding.***

Thus, nothing in the rationale of *Nollan* or *Dolan* suggests that heightened scrutiny of a land use regulation must be confined only to the circumstance where the condition of dedicating land is imposed. As is the case here, the exactions in *Nollan* and *Dolan* were imposed as conditions attached to a procedural prerequisite necessary to exercise the right to use property. The exactions in this case were not designed to ameliorate mere administrative costs. They were created to provide substantial public benefits that were ***not*** part of the project itself, will **not** benefit the project itself, and have **not** been shown to be related to any significant impacts caused by any project that would be facilitated by the removal of the existing "commercial recreation" land use designation. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1749-50 (1993), Appendix E9-10. Thus the condition imposed on Mr. Ehrlich fails to substantially advance a legitimate

governmental interest and is a taking. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The holding that the exaction violated the Takings Clause would not logically be any different if Mrs. Dolan had been told to give enough cash to Tigard so it could buy the greenbelt and bicycle path from her. Heightened scrutiny would still be required because she could not exercise her right to reasonably develop her property unless she paid a bounty that was not related to improving her property. Indeed, if government were to demand that Mrs. Dolan give away enough money to enable it to buy a bike path that would be a taking of her right to make reasonable use of her underlying property just as much as a demand for Mrs. Dolan to actually build the bike path. The same applies for Mr. Ehrlich. Whether he is told to give away cash or tennis courts, cash or art, he is being told he cannot use his land without agreeing to an unrelated condition.[2]

Furthermore, many of the cases relied upon by the *Dolan* majority in formulating its "roughly proportional" nexus test involved ***fees***:

> All but one of the cases involve challenges to provisions ... requiring developers to dedicate either

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[2] Incidentally, just as the taking of Mrs. Dolan's bike path or greenway standing alone, would be a taking, so too would be the taking of her money. This Court has previously held that where government takes money the Takings Clause may be implicated. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980) (Takings Clause applies to property right in money); *see also Village of Norwood v. Baker*, 172 U.S. 269, 296 (1898) (in condemning property for a street, a town cannot assess a property owner for the entire cost of the road); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 176 (1896) (assessment for water improvements must be in accordance with and in proportion to the benefits conferred by the improvement or else the Takings Clause is violated); *Wurts v. Hoagland*, 114 U.S. 606 (1885) (same). That money can be taken, of course, is not the dispositive factor here. It is that ***use*** of land is being unjustifiably restricted.

> a percentage of the entire parcel ... ***or an equivalent value in cash ... to help finance the construction of ... parks and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment.***

114 S. Ct. at 2324 (Stevens, J., dissenting) (emphasis added).

The standards articulated in *Nollan* and *Dolan* for reviewing conditions imposed upon the use of real property are just as applicable if there is an involuntary transfer of realty as there would be for an involuntary cash payment. It is the lack of an adequate nexus between the exaction and the use of property that counts, not the precise nature of the exaction. Thus, when the California Supreme Court found that the standards of *Nollan* and *Dolan* applied to the exaction of a public recreation fee, it was correct but not because that fee was set in the give and take of a permitting procedure, but because the fee was interfering with the exercise of the constitutional right to use property. By focusing on the procedure by which the amount of the fee is set, instead of the impediments imposed on the exercise of the constitutional right, the California court failed to recognize the constitutional requirement that the effect of the fee must be, ***in all cases***, to offset some adverse consequences of the particular project proposed for the particular property. Unfortunately, the California court is not alone.

II

THERE IS A SERIOUS CONFLICT IN THE LOWER COURTS WHICH ARE STRUGGLING TO PROPERLY APPLY NOLLAN AND DOLAN TO THE IMPOSITION OF DEVELOPMENT FEES

A. Many Lower Courts Have Also Failed to Recognize the Rationale Behind Nollan and Dolan and Thus Have Failed to Apply the Proper Takings Standards

In the past few years many lower state courts have tackled the question of whether the heightened scrutiny of *Nollan* and *Dolan*

applies when a government imposes a fee upon the use of property when the fee is designed to subsidize a public benefit not related, or only marginally related, to any impacts caused by the project. This reluctance to apply *Nollan* and *Dolan* to monetary exactions has been especially pronounced when the exaction is imposed pursuant to a legislative act.

For example, in *Home Builders Association v. City of Scottsdale*, 902 P.2d 1347 (Ariz. App. 1995), the Arizona appellate court upheld the city's resource development fee that was imposed on land owners in order to build a new water supply infrastructure. The court found that while development fees are subject to a takings analysis, 902 P.2d at 1350, *Dolan* did not affect legality of the fee at issue and refused to apply heightened scrutiny because the fee was "legislatively" imposed. *Id.* at 1352.

In dissent, the presiding judge disagreed with the idea that "a legislative determination affecting the entire city" was exempt from the *Dolan* test. In the light of *Dolan*, he argued, the appellate court had been wrong to reverse the trial court (which had struck down the fee). He argued that the majority applied a standard that gave too much deference to the municipality's determination that the fee was proper as beneficial to the development. *Id.* at 1353.

In *Loyola Marymount University v. Los Angeles Unified School District*, 45 Cal. App. 4th 1256; 1996 WL 281345 (1996), a California Court of Appeal upheld a fee levied for the benefit of schools by the local school district on all commercial and industrial construction. The university did not challenge the fee as a taking but rather on the basis of due process, but nevertheless cited *Nollan* and *Dolan*. Providing a taste of the confusion that will follow in the wake of *Ehrlich*, the court concluded that, since "[u]nlike *Ehrlich*, the present case falls within the general category of development fees," "we conclude that the heightened scrutiny standards articulated by the United States Supreme Court in takings clause cases have no application in California cases involving development fees." 1996 WL at *10. In other words the Court of Appeal here interpreted *Ehrlich's* discussion of the distinction between legislative and individually applied fees as a carte

blanche for local governments to impose development ***fees legislatively*** and thus avoid serious constitutional analysis.

In *Arcadia Development Corp. v. City of Bloomington*, 1996 WL 453243 (Minn. App. 1996), a Minnesota appellate court upheld the imposition of a tenant-relocation fee imposed on owners of mobile home parks in exchange for permission to go out of the mobile home park business. The appellate court rejected application of *Dolan* to tenant relocation fees because the fee was legislatively imposed. It found that "once legitimate governmental interests are identified, courts simply require a nexus between the local legislation and the legitimate governmental purposes." Slip. op. at 5-6. Here, the "redistribution of the benefits and burdens of economic life" represented by the fee was a legitimate governmental purpose. Slip. op. at 6.

In *Garneau v. City of Seattle*, 897 F. Supp. 1318 (W.D. Wash. 1995), legislation provided that every low-income tenant displaced by demolition, change of use, substantial rehabilitation, or removal of use restrictions would be paid $2,000, half to be paid by the city and half by the landlord. The court upheld the fee, questioning whether *Nollan* and *Dolan* applied at all. 897 F. Supp. at 1325. The court relied on a Ninth Circuit decision, *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), for the proposition that *Nollan* changed the level of scrutiny only as to cases involving ***physical*** encroachments. Then, evidencing a misunderstanding of what this Court meant in *Dolan*, the court proceeded to find that, even if *Dolan's* rough proportionality test were applied, requiring the landlord to pay $1,000 for each displaced tenant's moving expenses would pass constitutional muster. 897 F. Supp. at 1326. The problem was that the court engaged in no analysis purporting to show a relationship between the fee and the owners' use of their property for other purposes. *See also Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892 (1986) (upholding a low-income tenant relocation fee prior to *Nollan*).

B. A Number of Jurisdictions Have Applied Nollan and Dolan Standards to Monetary Exactions, Including Some That Were Legislatively Imposed

Although courts in a number of jurisdictions have been reluctant to rein in local governments that use the permitting process as a public works slush fund, there have been at least a few that recognize that the standards articulated in *Nollan* and *Dolan* do apply to the imposition of development fees. For example, in *Northern Illinois Home Builders Association v. County of Du Page,* 884 P.2d 569 (Ill. Ct. Apps. 1994), the court cited both *Nollan* and *Dolan* as setting a new standard for analyzing monetary exactions imposed as permit conditions. Ultimately, the fee in question, designed to pay for new transportation projects, was struck down on statutory grounds.

In *Trimen Development Co. v. King Co.*, 877 P.2d 187 (Wash. 1994), a developer had been given the choice of dedicating or reserving land for open space or paying a fee in lieu of such dedication. The court properly recognized the applicability of the *Dolan* test to these ***legislatively*** imposed fees. 877 P.2d at 194. The fees were upheld, incidentally, as the court found that the fees were "reasonably necessary as a direct result of Trimen's proposed development." *Id.*

The broad applicability of the *Nollan* and *Dolan* analysis to conditions (of all types) imposed on a land use permit was recognized in *Clark v. City of Albany*, 904 P.2d 185 (Or. App. 1995), a case that did not involve development fees. In *Clark*, a restaurant was required to design and construct improvements on the street adjoining the site in exchange for a building permit. The court found this requirement to constitute an exaction subject to the *Dolan* requirement of rough proportionality. "[T]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies *only* to conditions of that kind." 904 P.2d. at 189.

The imposition of fees upon property owners which are designed to provide low-cost housing have been a particularly fertile area for government abuse. In addition to those cases described in the preceding section where such fees were upheld,

there have been a number with an opposite result. For example, before *Dolan* was decided, but after *Nollan*, the New York Court of Appeals struck down a fee imposed on owners of single room occupancy hotels in *Seawall v. City of New York*, 74 N.Y.2d 92, 544 N.Y. Supp. 2d 542, 542 N.E.2d 1059 (1989). The fee had been imposed by ***legislation*** and, as such, was uniformly applied. 542 N.E.2d at 1061-62. The court focused on the lack of a nexus between the complex problem of low-income housing in New York City and the landowners' use of their property for other purposes. *Id.* at 1069 ("Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem.")[3] Faced with the same facts, the *Ehrlich* court wold have upheld on two possible grounds. First, because the fee had been imposed pursuant to a legislative enactment, the *Ehrlich* court would apply only a deferential standard of review. Second, the fee was imposed to offset a change in a land use restriction, allowing the use of the property for something other than hotel rooms, depriving the public of the benefit of cheap hotel space.

In *City of Portsmouth v. Schlesinger*, 46 F.3d 133, 135 (1st Cir. 1995), the court reviewed a low-income housing fee that had been imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 134. While the challenge to the fee was saddled with a statute of limitations problem, the court noted that the facts were undisputed that no "rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." *Id.* at 135. If not for the limitations problem, the court would have struck down the fee. Under *Ehrlich*, however, the zoning change allowing condominiums on the site of low-income housing could have justified the fee.

Similarly, in *Aspen-Tarpon Springs, Ltd. v. George Stuart*, 635 So. 2d 61 (Fla. App. 1994), the Florida Mobile Home Act's

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[3] The court also found, as a separate ground for striking down the ordinance that it was a physical invasion. *Id.* at 1065.

relocation fee was found to be unconstitutional in that it unfairly singled out park owners thus failing to substantially advance legitimate governmental interest. Again, *Ehrlich* would mandate a conflicting result because the public would have allegedly lost land dedicated to mobile home parks and the owner could have a duty to mitigate this loss.

With some courts finding that *Nollan* and *Dolan* do not apply to development fees, and the *Ehrlich* court finding that at least some fees are subject to *Nollan* and *Dolan*, but not necessarily understanding why, it is plain that confusion is the hallmark of the lower courts today. Such confusion should be clarified by this Court.[4]

C. The Attention Focused on the "Legislative" Exception to the Takings Clause Has Been Questioned by Members of This Court and Other Courts as Well

The notion that exactions that are legislatively imposed should be treated any differently from those imposed as part of an individual permitting process has been questioned by members of this and other courts. For example, in *Parking Association of Georgia v. City of Atlanta, Georgia, Inc.*, ___ U.S. ___, 115 S. Ct. 2268 (1995), the Georgia Supreme Court upheld a requirement that parking lots dedicate 10% of their surface area to aesthetic improvements. Although this Court did not grant certiorari, it is notable that two members suggested that the time had arrived to review the reliance upon a "legislative enactment" rationale to avoid a careful scrutiny of certain exactions. 115 S. Ct. at 2269.

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[4] These cases are not, of course, concerned with legislatively imposed zoning schemes of general applicability which are not necessarily subject to the heightened scrutiny of *Nollan* and *Dolan*. *See Dolan*, 114 S. Ct. at 2316. It is the ***application*** of the exaction to individual parcels of property that gives rise to heightened scrutiny. Indeed, both *Nollan* and *Dolan* involved the application of legislatively imposed or broadly applicable conditions. *Dolan*, 114 S. Ct. at 2313; *Nollan*, 483 U.S. at 829.

Similarly, an Illinois appellate court agreed in *Amoco Oil Co. v. Village of Schaumberg*, 661 N.E. 2d 380 (Ill. App. 1995), that

> "although not binding as precedent, we find Justice Thomas' comments [in *Parking Association of Georgia*] particularly persuasive and consonant with the rationale underlying *Dolan* and similar cases. Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property." Id. at 390.

III

THE DECISION OF THE COURT BELOW TURNS TRADITIONAL UNDERSTANDINGS OF THE RELATIONSHIP BETWEEN PRIVATE PROPERTY AND GOVERNMENTAL REGULATION ON THEIR HEAD

The California Supreme Court announced the novel proposition, provided without citation, that "it is well accepted in both the case and statutory law that the discontinuance of a private land use can have a significant impact justifying a monetary exaction to alleviate it." 12 Cal. 4th at 879. From there the court proceeded on a speculative exegesis of the sort of fees that might be imposed on remand, suggesting that while replacing a private tennis club with public tennis courts might be too much of a reach, 12 Cal. 4th at 883, perhaps Richard Ehrlich could be assessed a fee to cover the "additional administrative expenses incurred in redesignating other property within Culver City for recreational use." *Id.* at 884. The court surmised that it would be permissible to impose a "fee [that] would enable the city to induce private health club development by offering monetary incentives roughly proportional to the land use incentive it relinquished when it removed the recreational use restriction from plaintiff's property." *Id.* In other words, Ehrlich would have to pay a large enough fee to induce another developer to come into Culver City, convert property from its current designated use to commercial recreation, and build a tennis and health club to replace the old one that

consistently lost money for a dozen years while operating on Ehrlich's property.[5] Unless the court was relying on the greater fool theory,[6] it is apparent that most developers would want a rather large sum of incentive money up front before they would build a club that was a proven money-loser in this community.[7] In short, for Ehrlich the fee to induce a new developer into Culver City wold be worse than the cure.

More problematic, however, is what this sort of formulation says about the court's understanding of property. Since the days of the Magna Carta it has been understood that a person has dominion over his property. As later explained by Blackstone,

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic

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[5] The court did not say whether Ehrlich would have to compensate the new developer for whatever fees might be required of *that* developer. Under the California court's analysis fees would be assessed against the developer to compensate the public for the loss of the allowed uses of the new parcel before the use designation is changed to commercial recreation. The court did not say how far this domino effect would go.

[6] When a speculator buys a commodity at an inflated price, hoping to sell it to another speculator at an even more inflated price, the "greater fool" theory is at work. Who but a fool would attempt to step into Ehrlich's shoes?

[7] Alternatively, a developer might demand other concessions, such as permission to build a different sort of club from the one that Ehrlich was restricted to by the detailed land use restriction on his property. Ehrlich was not able to do this because his parcel was too small. Appendix A-5, G-9. Treating a new developer differently further avoids rough proportionality because Ehrlich would be subsidizing a developer to do what he was not allowed to do--which was the cause of Ehrlich attempting to get the use restriction changed in the first place.

> dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

W. Blackstone, *Commentaries* 2 (1765). By having dominion over property, the owner is free to do--or not to do--with his property whatever the owner may desire--so long as the community and neighbors are not adversely affected. The ownership of property represents a place where the owner can be free from the control of others, where a person can enjoy a certain sense of personal liberty that is not dependent upon a governmental boon.

The relationship between private property ownership and liberty is well known to this Court. It has stated that

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right .... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).[8] And, in *Mayor v. Knoxville Water Co.*, 212 U.S. 1, 18 (1909), this Court wrote,

> "[o]ur social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows."

What this means, of course, should be obvious: property is owned by the owner and not the public. Nor is property owned in a euphemistic "cooperation" with either the government or the public. While property may be regulated to prevent activities on property from having an adverse impact on neighboring property, it has never been understood, at least in nations with an English common law heritage, that the public gains a permanent right or servitude in a person's private property from the imposition of a regulation.

Zoning laws, for example, are regulations designed to prevent owners from using property in a way that is detrimental to neighboring owners or the community--before the harm is done. By establishing zones where it can be safely assumed that certain designated uses will not have an adverse public impact, the task of

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[8] This is, of course, what John Locke was explaining in the SECOND TREATISE ON GOVERNMENT, when he stated, "it is not without reason that he [man] seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name- property." Paragraph 123. For an opposing view, *see* Marx and Engels, THE COMMUNIST MANIFESTO, ch 2, ¶ 14, which dismissed the idea of "the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity and independence" as no longer being relevant in times dominated by the bourgeoisie. *See also Block v. Hirsh*, 256 U.S. 135, 165 (1921) (McKenna, dissent) ("[t]he security of property next to personal security against the exertions of government is of the essence of liberty.")

regulating property is simplified. Under most zoning laws, however, an owner always should have an opportunity to prove that another use will not have an adverse public impact. But under no circumstances can it rationally be suggested that by establishing a specific zoning or land use restriction, the public has acquired a ***right*** to enjoy whatever benefits it may receive from the owner's use of the property in accordance with the established restrictions. But never before has a court found that there is a ***right*** owned either by the public or a land owner to the perpetual enjoyment of the status quo of existing land use restrictions.[9] This Court can clarify that the application of a land use restriction does not give the public a perpetual right to that restriction and does not give the community the right to demand payment when the land use restriction is changed.

The imposition of land use restrictions does not alter the fundamental nature of property ownership. It does not transfer dominion from the owner to the public. And yet the road embarked upon by the California Supreme Court, whether or not the court so intended, leads to an inexorable destruction of traditional understandings of property. People will be seen in the future to own their property in a "partnership" with the government. Land use restrictions will not represent attempts to prevent mischief to neighbors and the community but will be a unilateral imposition by the government of a vested interest in the future use of the property. An owner will have only the dominion over property that the owner's larger partner will allow. As happened to Richard Ehrlich, an owner desiring to change a land use restriction can be forced to "buy" out the larger partner. In short, the ownership of property will lose its character as an individual right and will become in a real sense just one more government entitlement.

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[9] Indeed under California law it is clearly established that the property owner has no vested right in any use allowed by zoning. *Avco Community Developers Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785, 796 (1976).

CONCLUSION

This Court has an opportunity to lead the California and other errant courts back from a troubling path. By granting certiorari in this case, this Court can determine whether a property owner actually owns land in the traditional sense or whether the public now owns a continuing right to enjoy the "benefits" of whatever land use restrictions the community placed upon a parcel of property in the past--even if those benefits have not yet been realized or have been lawfully discontinued. The lower courts are in a state of confusion. They have looked at *Nollan* and *Dolan* without recognizing the fundamental premises of property ownership that are the foundation for the application of the Takings Clause in these cases. Without this understanding, many lower courts are adrift, upholding exactions and finding artificial reasons not to apply the discipline invoked by these cases.

For all these reasons, this Court must grant certiorari in this case.

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